(1) Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

THOMAS W. JONES,
Petitioner,

v.

FREDERICK FRANK; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, to "fairly present" a claim for purposes of exhaustion of state remedies under 28 U.S.C. § 2254(b), a petitioner must not only state a particular constitutional theory and applicable facts but also request a certain form of relief.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were Thomas W. Jones, Appellant; Frederick Frank; the District Attorney of the County of Philadelphia; and the Attorney General of the State of Pennsylvania.

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PETITION FOR WRIT OF CERTIORARI

Thomas W. Jones petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit that he failed to "fairly present" his constitutional claim to the Pennsylvania Supreme Court for purposes of exhausting state remedies under 28 U.S.C. § 2254(b).

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1a-4a), entered on September 20, 1999, is unreported. The court of appeals' order denying rehearing and rehear-

ing *en banc* (App. 7a-8a) entered on December 2, 1999, is also not published. The opinion of the district court (App. 9a-22a) is published as *Jones v. Frank*, 28 F. Supp. 2d 956 (E.D. Pa. 1998).

JURISDICTION

The court of appeals' decision was entered on September 20, 1999. Rehearing and rehearing *en banc* was denied on December 2, 1999. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the States; or
> >
> > (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

* * *

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

This Petition continues Petitioner's 18-year struggle to overturn a state conviction that violated his Sixth Amendment right to counsel free from a conflict of interest. In 1991, Petitioner completed one full round of state appeals in which he presented both the facts and the underlying legal theory supporting his Sixth Amendment claim to each level of the state courts. Petitioner then initiated a second round under Pennsylvania's Post-Conviction Relief Act ("PCRA") and was denied relief by the court of common pleas. Finally, Petitioner sought habeas relief in federal district court, which denied his petition on the ground that he had failed to "fairly present" his claim during the first round of state appeals and had procedurally defaulted by not completing the second.

Petitioner appealed to the Third Circuit, which observed that he had presented his claim to two of the three Pennsylvania courts during the first round, but found that, for purposes of exhaustion of state remedies under 28 U.S.C. § 2254(b), Petitioner failed to "fairly present" his claim to the Pennsylvania Supreme Court during that round. The Third Circuit based its decision on the relief requested. It found that because Petitioner asked the Pennsylvania Supreme Court to reverse the superior court's finding of waiver, the claim presented to the Pennsylvania Supreme Court was not the same claim presented in federal court.

The Third Circuit's reasoning conflicts with the Eleventh Circuit's approach. By a decision of December 15, 1999, the Eleventh Circuit rejected this "relief-centered" theory of exhaustion and reaffirmed this Court's substance-centered approach that requires, as a requisite to federal habeas relief, that a petitioner present the facts and underlying legal thory to each state court, such that the state has the opportunity to resolve a petitioner's federal claim first.

This Petition has its origins in the Pennsylvania state courts in 1983, when Petitioner's appeals counsel, taking over for trial counsel, discerned from the trial record that trial counsel had failed to investigate Petitioner's mental state in advance of trial. In 1982, Petitioner had been found guilty of first-degree murder and sentenced to death. Reviewing the trial record, appeals counsel noticed that trial counsel failed to offer mitigating evidence during the penalty phase of the case.

Amending the post-trial motions filed by trial counsel just before he withdrew from the case, appeals counsel added a claim of ineffective assistance of counsel during the pre-trial period. She specifically faulted trial counsel for failing to hire a psychologist and social worker to prepare for sentencing and alleged a violation of Petitioner's Sixth Amendment rights. Appeals counsel recognized trial counsel's ineffectiveness from the record, but, because the facts of the conflict were not contained in that record, had no way to know the defect resulted from an unconstitutional conflict of interest.

The common pleas court denied the motions and entered a death sentence. Appeals counsel then appealed as of right to the Pennsylvania Supreme Court from Petitioner's conviction and sentence of death. She raised the same issues included in the post-trial motions. Appeals counsel

then withdrew, and another lawyer ("remand counsel") took over.

Addressing the appeal prepared by appeals counsel, the Pennsylvania Supreme Court remanded to the trial court for an evidentiary hearing on the merits. The order reads *in toto*: "Matter remanded to the Court of Common Pleas of Philadelphia for an evidentiary hearing on the question of the effectiveness of trial counsel."

The Pennsylvania Supreme Court's broad order enabled remand counsel to investigate beyond the trial record. The investigation uncovered the reason for trial counsel's ineffectiveness—a conflict of interest. In three days of hearings before the common pleas court in 1987, testimony revealed the following facts.

In August 1981, Petitioner's brother was found dead, his body charred and hanging from a tree by a chain. The police ruled the death a suicide. In an argument over funeral arrangements, Petitioner's brother-in-law, Charles Nichols, shot and seriously wounded Petitioner. The bullet entered Petitioner's chest and exited through his throat, requiring a lengthy hospitalization. Nichols was charged with attempted murder and retained a defense attorney who would later become Petitioner's trial counsel.

In the hospital, Petitioner underwent extreme behavioral changes. He became despondent, had nightmares and required psychiatric care. After his release, Petitioner drank heavily and was prone to extreme anger. He discontinued seeing his psychiatrist. Within weeks, Petitioner was arrested for murder.

After Petitioner's arrest, Nichols and other family members encouraged Petitioner to hire trial counsel, who already represented Nichols in the attempted murder of Petitioner. Petitioner did so. Nichols paid part of trial

counsel's fee. Trial counsel began his representation of Petitioner on January 25, 1982.

At a hearing on the attempted murder charge against Nichols, Petitioner, then in custody, was called to testify for the prosecution. On that occasion, trial counsel explained to Petitioner's family that he could not defend Petitioner against the murder charge unless Petitioner refused to testify against Nichols. Trial counsel never explained the meaning of "conflict of interest" and never sought a waiver from Petitioner. Petitioner agreed not to testify and asserted his Fifth Amendment privilege on advice of trial counsel, and the case against Nichols was dropped on March 12, 1982.

During his representation of Petitioner, trial counsel never pursued plea negotiations with prosecutors, even though an opportunity existed for Petitioner to cooperate in the prosecution of Nichols in exchange for a guilty plea on less than first-degree murder. Trial counsel never pursued a defense of diminished capacity, even though he knew that the death of Petitioner's brother and the shooting of Petitioner by his other client caused extreme behavior changes that affected Petitioner by the time of his arrest for murder. A successful diminished capacity defense would have reduced Petitioner's conviction to third-degree murder. Either strategy would have implicated trial counsel's other client, Nichols, in the shooting of Petitioner. Rather than implicate Nichols, trial counsel defended Petitioner on a theory that someone else committed the murder. Petitioner was convicted and sentenced to death.

In the 1987 hearing on remand, the above facts were revealed through the testimony of trial counsel, his associate, and family members. After the hearing, remand counsel briefed the conflict issue extensively. He argued the facts and relied upon the leading effective assistance

and conflict of interest cases, *Strickland v. Washington*, 466 U.S. 668 (1984) (prejudice is presumed once a conflict is established), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (same). The common pleas court issued an opinion on the merits of trial counsel's effectiveness, ruling that: "[t]rial counsel's failure to investigate the circumstances of defendant's hospitalization and treatment shortly before the murder and the resultant absence of such evidence for the jury's consideration at the sentencing phase deprived [Petitioner] of effective assistance of counsel in a life or death situation."

The court failed to apply the law governing conflicts of interest, however, and ruled against Petitioner on the conflict claim, notwithstanding that the conflict itself prevented trial counsel from raising the circumstances surrounding Petitioner's mental state. Applying the standard for ordinary claims of ineffectiveness, the judge held that trial counsel's defense was reasonable and, hence, sufficient. Despite finding trial counsel ineffective during the penalty phase, the common pleas court refused to vacate the death sentence.

After the court of common pleas refused to act, remand counsel petitioned the Pennsylvania Supreme Court for extraordinary relief. That petition sought both to vacate the death sentence and to obtain a ruling that the conflict of interest entitled Petitioner to a new trial. The petition stated in part:

> Other appellate issues remain. Most importantly, present defense counsel discovered in preparation for the hearing on remand that trial defense counsel was severely hampered in his defense at trial by a conflict of interest that also was greatly responsible for the ineffective assistance at sentencing. Judge Durham declined to find that the conflict affected trial counsel's ability to defend the guilt phase of the

> case; however, substantial undisputed facts were established in the record that will permit this Court to rule on the question as a matter of law.

The Pennsylvania Supreme Court failed to act upon the petition. While the petition was pending, the Commonwealth wrote to the Pennsylvania Supreme Court agreeing that the death sentence should be vacated, but arguing, incorrectly, that the court lacked jurisdiction to decide the remaining issues. The Pennsylvania Supreme Court still did not act.

To effect Petitioner's delivery from death row, almost a full six months after the court of common pleas found trial counsel ineffective, remand counsel filed a second petition with the Pennsylvania Supreme Court again to vacate the death sentence but deferring to the Commonwealth's position on transferring the remaining issues to the superior court. Five months later, the Pennsylvania Supreme Court ordered the sentence vacated and entered another broad order permitting appeal to the superior court. In pertinent part, the order reads:

> It is ORDERED that any further appeal from the entry of the judgment of sentence, as directed by this order, is to be taken to the Superior Court pursuant to 42 Pa. C.S.A. § 742, with the time period for such appeal commencing from the trial court's imposition of the sentence in accordance with paragraph 1 of this Order. The appellant may address in the appeal to the Superior Court those issues which were presented in the initial appeal to this Court and were not considered, as well as any other issues that may be deemed appropriate for review.

Represented by new counsel ("post-remand counsel") in his appeal to the superior court, Petitioner again argued that trial counsel labored under a conflict of interest that violated his Sixth Amendment right to counsel.

Post-remand counsel briefed the merits of the conflict and the reason for appeals counsel's failure to allege it, extensively. He set forth the facts and the applicable law, relying upon *Strickland, supra, Cuyler, supra,* and *Holloway v. Arkansas,* 435 U.S. 475 (1978) (explaining the impermissible effects of a conflict), as well as Pennsylvania cases resolving Sixth Amendment conflict issues.

In an opinion in 1990, the superior court described the fact of the conflict, but decided the issue had been waived because appeals counsel, despite alleging trial counsel's ineffectiveness in failing to investigate Petitioner's mental state, had not stated that the ineffectiveness was a result of a conflict of interest. The superior court ignored evidence that the fact of the conflict could not have been discerned from the trial record but was raised by remand counsel as soon as it was discovered.

Post-remand counsel petitioned the Pennsylvania Supreme Court for allocatur seeking reversal of the superior court's ruling:

> Petitioner respectfully requests that this Court grant his Petition for Allowance of Appeal and enter an order mandating that the Superior Court reach the merits of the conflict claim. . . . As directed by this Court's first order, a full record on trial counsel's ineffectiveness, including his conflict of interest, has been developed, the trial court has considered and ruled on the conflict, and the issue is now ripe for appellate review.

The petition for allocatur introduced the discussion of the facts with the statement that "[a]s the Common Pleas Court's record demonstrates, and as discussed *infra,* Jones' trial counsel labored under a conflict of interest as shocking as any reported in the opinions written by the courts of this Commonwealth." The petition specified a

violation of the Sixth Amendment of the Constitution of the United States. The petition then developed the facts surrounding the conflict and explained why appeals counsel alleged that trial counsel was ineffective but could not have raised the reason for it. Further, in footnote 3 of the petition, Petitioner explicitly argued the merits of the conflict issue. Because the Third Circuit cited only part of the footnote in its denial of Petitioner's petition for rehearing and rehearing *en banc*, the footnote is reproduced here in full:

> Petitioner will not now argue in detail the legal analysis supporting his contention that trial counsel's performance was hindered by a debilitating conflict of interest. The argument was painstakingly briefed and then argued before the Superior Court. As discussed *infra*, petitioner seeks only that this Court order the Superior Court to decide the conflict issue. Briefly stated, petitioner's argument is as follows:
>
> Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), conflict issues, unlike ineffectiveness questions generally, are excepted for special treatment as "prejudice is *presumed* when counsel is burdened by an actual conflict of interest." *Id.* at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). *See also Commonwealth v. Buehl*, 519 Pa. 363, 379, 508 A.2d 1167, 1175 (1986) (prejudice is presumed whenever it appears that counsel represented conflicting interests and that an actual conflict adversely affected counsel's performance), *cert. denied*, 109 S. Ct. 187 (1988). The Superior Court, in *In re Saladin*, 359 Pa. Super. 326, 518 A.2d 1258 (1986), articulated guidelines for determining when relief is proper. First, an actual conflict of interest "is evidenced whenever during the course of representation, the interests of the [aggrieved client]—and the interests of another client towards whom counsel bears obligations—diverge with respect to a material,

factual or legal issue or to a course of action." *Id.* at 332, 518 A.2d at 1261. Second, it must be determined whether the conflict of interest "adversely affect[ed]" counsel's representation of the aggrieved client. *Id.* The "adverse affect" strand of the conflict analysis is defined in terms of a "lost opportunity." *Id.* at 335, 518 A.2d at 1263.

The record shows that Serota's [trial counsel's] representation of Jones overlapped his representation of Nichols. *See* N.T., September 14, 1987 at 19 (district attorney describes chronology of representation). Moreover, although Serota's representation of Nichols ended with the entering of the *nolle prosse*, Serota testified that both he and Nichols believed that they had an attorney-client relationship beyond the termination of the attempted murder prosecution of Nichols. N.T., October 7, 1987 at 15.

The conflict impaired Serota's representation of Jones in two important ways. First, Jones' testimony against Nichols could have formed the basis of a favorable plea agreement. *Cf. Commonwealth v. Fontana*, 490 Pa. 7, 13 n.5, 415 A.2d 4, 5 n.5 (1980) ("an attorney with divided loyalties cannot negotiate a plea agreement on behalf of one client which includes an agreement by that client to testify against a co-defendant the attorney also represents."). Unfortunately, Jones (with Nichols paying the fee (N.T. October 7, 1987 at 22)) also retained Serota. Jones, with at least the implicit encouragement of Serota's associate, refused to testify and Nichols walked.

Additionally, that Serota could not even consider a diminished capacity defense, reducing the homicide to third degree murder, worked another "lost opportunity" upon Jones. Had Serota elected to present a psychiatric or psychological defense (by putting into evidence of Jones' brother's suicide and Nichols'

> shooting of Jones), the reasons underlying Jones' trauma would have had to have been aired in court. Such evidence could have led to the re-prosecution of Nichols on the attempted murder charge. *Cf. Commonwealth v. Whiting*, 509 Pa. 20, 22-23, 500 A.2d 806, 807 (1985) (*nolle prosequi* is a voluntary dismissal which can at anytime be retracted to permit revival of proceedings). As the factual record in support of this legal argument was available to the Superior Court, that Court, consistent with this Court's mandate, should have ruled on the issue.

Finally, to avoid any suggestion that Petitioner was waiving any issue decided by the superior court, another footnote expressly sought review of all other issues.

After the Pennsylvania Supreme Court denied the petition without opinion in 1991, Petitioner had completed one full round of appeals and was entitled to seek federal habeas relief. Represented by yet another lawyer in 1992, however, Petitioner instead initiated a PCRA proceeding in the common pleas court. The court denied relief. Petitioner was next able to retain counsel to pursue his claim in April 1997, at which time he filed the federal habeas petition at issue here.

In its denial of rehearing and rehearing *en banc*, the Third Circuit cited footnote 3 of the petition for allocatur as a dispositive fact that the "allocatur petition to the Pennsylvania Supreme Court did not . . . expressly argue the merits of the conflict of interest claim." App. 8a. The Third Circuit's conclusion begs the question: whether it is sufficient that Petitioner gave the state courts the opportunity to remedy his constitutional violation by presenting the facts and legal support for his claim, or whether he was additionally required to seek a specific form of relief before that claim could be considered exhausted under 28 U.S.C. § 2254.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Third Circuit's decision conflicts with the Eleventh Circuit's approach and contravenes this Honorable Court's existing exhaustion standard. Further, this Court has never addressed whether a petitioner must specify a certain form of relief to exhaust a claim; therefore, the question is ripe for review.

I. THE THIRD CIRCUIT'S DECISION THAT A PETITIONER MUST EXHAUST STATE REMEDIES NOT ONLY BY PRESENTING THE SUBSTANCE OF A CLAIM, BUT ALSO REQUESTING A CERTAIN FORM OF RELIEF, CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION IN *HENRY v. DEP'T OF CORRECTIONS*, 197 F.3d 1361 (11TH CIR. 1999).

This Court consistently has held "fair presentation" to mean giving state courts the opportunity to decide a constitutional claim by presenting the facts and legal theory underlying the issue to the state courts. In two unpublished orders, the Third Circuit would add another requirement: that a petitioner also must specify the same request for relief before each state court. The Eleventh Circuit recently rejected that "relief-centered" approach, finding that, where a petitioner set forth the facts and law supporting a claim, but, pursuant to permissive state procedure, sought a form of relief (an evidentiary hearing) other than a decision on the merits, petitioner had "fairly presented" the claim.

A. The Third Circuit Incorrectly Found Petitioner's Claim Unexhausted Even Though Petitioner Had Raised It Before All State Courts Because, On Appeal To The Pennsylvania Supreme Court From A Finding Of Waiver, Petitioner Sought Reversal Of The Decision Rather Than A Decision On The Merits.

The meaning of "fair presentation" has changed little since this Court held, in *Picard v. Connor*, 404 U.S. 270 (1971), that to satisfy exhaustion requirements "the substance of a federal habeas corpus claim must first be presented to the state courts." *Id.* at 277. To accord state courts the first opportunity to correct constitutional wrongs done to their prisoners, *id.* at 275-76, a petitioner must alert the state courts that he claims a violation of a right guaranteed under the Constitution of the United States. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). In essence, the facts and the legal theory underlying the claim must be presented. *Gray v. Netherland*, 518 U.S. 152, 163 (1996). This is not a jurisdictional rule, but one that addresses concerns of comity. *Rose v. Lundy*, 455 U.S. 509, 515-18 (1982).

Each level of state courts must have one full opportunity to rule on petitioner's claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 1733-34 (1999). Under 28 U.S.C. § 2254(c), a petitioner is not required to pursue more than "one complete round of the State's established appellate review process," *Boerckel*, 119 S. Ct. at 1732, even if the state denied petitioner's appeals on procedural grounds. *See Castille v. Peoples*, 489 U.S. 346, 351-52 (1989). In such a case, petitioner is entitled to argue cause for the procedural default and prejudice arising therefrom as a means to gaining federal review of his claim. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

In this matter, the Third Circuit's Memorandum Opinion considered Petitioner's claim unexhausted because

Petitioner did not explicitly ask the Pennsylvania Supreme Court itself to rule on the merits of the conflict claim. Instead, Petitioner presented the claim to the Pennsylvania Supreme Court appropriately as an appeal from the superior court's decision that he had waived his claim. *See, e.g.*, Pa. R.A.P. 1114 (allocatur review is a matter of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefrom). The Third Circuit found: "In the petition for allocatur, the question presented was whether the Superior Court had correctly ruled on the default. As such, the merits of the Petitioner's conflict of interest argument were not at issue." App. 3a. By this route, the Third Circuit found that the claim had not been "fairly presented" to the Pennsylvania Supreme Court, citing *Duncan*, 513 U.S. at 365-66. The Third Circuit apparently concluded the Pennsylvania Supreme Court had not had the opportunity to remedy the wrong, despite noting that Petitioner already had presented the claim to the two other courts in the "established appellate review process" —the court of common pleas and the superior court—as required by *Boerckel*, 119 S. Ct. at 1733. It appears that the Third Circuit required Petitioner to seek a certain form of relief for the conflict claim to exhaust state remedies. This adds a legal burden not mandated by this Court.

B. Contrary To The Third Circuit's Decision, The Eleventh Circuit Found That A Petitioner Exhausted State Remedies By Presenting The Substance Of His Claim To The State Courts Despite Failing To Request A Decision On The Merits At Each Level.

The Third Circuit's approach conflicts with an Eleventh Circuit opinion issued just two weeks after the Third Circuit denied Petitioner's petition for rehearing and re-

hearing *en banc*. In *Henry v. Dep't of Corrections*, 197 F.3d 1361 (11th Cir. 1999), the petitioner's murder conviction was affirmed on appeal, and the petitioner sought relief under Florida's post-conviction statute. There, the trial court rejected the petitioner's effective assistance of counsel claim. In his appeal of that decision, the petitioner "characterized the issue . . . solely as whether '[t]he trial court erred in denying defendant's motion for postconviction relief without an evidentiary hearing.' " *Id.* at 1363 (internal citation omitted). The appellate court ruled against the petitioner without opinion, and the petitioner initiated a federal habeas proceeding. The federal district court found that the petitioner had failed to exhaust because he failed to request identical relief from the state and federal courts; the district court decided the petitioner was required to request a ruling on the merits from the state appellate court to "fairly present" the issue. *Id.*, 197 F.3d at 1366.

The Eleventh Circuit reversed, holding that, because the petitioner's briefs presented the appeals court the facts and citations to cases relevant to the effective assistance claim, petitioner had "fairly presented" his claim for purposes of exhaustion. *Id.* at 1367-68. To reach its conclusion, the Eleventh Circuit reasoned that, under *Picard*, "[t]he essence of the exhaustion requirement is that a petitioner's constitutional claims be 'fairly presented' to the state courts such that they have 'an opportunity to apply controlling legal principles to the facts bearing upon them.' " *Id.* at 1366. The Eleventh Circuit noted that this Court had not addressed the question "whether a petitioner must not only state a particular constitutional theory and applicable facts but also request a certain form of relief." *Id.* Though narrowly tailored, the opinion stands for the proposition that, when a petitioner argues his claim on appeal from a decision not on the

merits, he should not be foreclosed from federal review simply because he followed state procedure when characterizing his belief sought.

C. The Third Circuit's Decision Should Be Reversed And The Eleventh Circuit's Approach Should Be Applied Uniformly, Because Requiring A Petitioner To Specify A Certain Form Of Relief In Addition To Presenting The Substance Of A Claim To The State Courts Is Inconsistent With This Court's Exhaustion Standard.

The Eleventh Circuit's approach is consistent with *Picard* and its progeny and furthers the purpose of exhaustion. In *Picard*, the petitioner filed a habeas petition arguing that the manner in which he was brought to trial deprived him of equal protection under the Fourteenth Amendment. 404 U.S. at 271. Because the petitioner had deprived the state courts of the opportunity to decide his federal claim by raising his claim only under state law, this Court found the petitioner had not exhausted state remedies. In the decision, the Court outlined the requirements for fairly presenting the issue: first, a petitioner must "present the state courts with the same claim he urges upon the federal courts," *id.* at 276; and, second, he must present the "substance of a federal habeas corpus claim" sufficient to allow the state courts to remedy the wrong. *Id.* at 278. This is a "substance-centered" approach. This Court reiterated the *Picard* "fair presentation" standard in *Anderson v. Harless*, denying habeas relief because the petitioner's "constitutional argument was never presented to, or considered by, the [state] courts." 459 U.S. 4, 7 (1982).

Never has this Court required more from a petitioner than a presentation of constitutional claims to the state courts. Indeed, the Court requires "only that the 'substance' of the federal claim (not the form) be 'fairly pre-

sented' to the state courts." *Harless*, 459 U.S. at 10-11 (Stevens, J., dissenting) (citing *Picard v. Connor*, 404 U.S. 270 (1971)). The rationale behind the framework is clear: exhaustion does not exist to provide a jurisdictional bar to federal relief, but to ensure states have the first opportunity to remedy wrongs occurring in their courts. *See Boerckel*, 119 S. Ct. at 1731.

In this case, because Petitioner argued the facts and the applicable federal law consistently in each appeal, the state courts had the "opportunity" to remedy the defect. *Id.* at 1732; *see Duncan*, 513 U.S. at 365-66. The Eleventh Circuit understood what the Third Circuit did not: it matters not whether Petitioner explicitly asked the state supreme court to rule on the merits of his claim. What matters is that the "substance" of the pleading alerted the court to the facts and law sufficient to allow the court to rule on the merits, and that the court had jurisdiction to do so. *See Picard*, 404 U.S. at 278.

Here, the substance of the claim was before the Pennsylvania Supreme Court, and, under 42 Pa. Cons. Stat. Ann. § 726, the court had jurisdiction and authority "to cause right and justice to be done" by addressing the merits of the conflict claim. *See Commonwealth v. Martorano*, 535 Pa. 178, 188, 634 A.2d 1063, 1067 n.6 (1993) (noting that "[e]ven if we were to conclude that the procedural rules do not give the court jurisdiction over the substantive issue, we could assume jurisdiction of the case pursuant to our King's Bench Powers, 42 Pa. C.S. § 726, in order to conserve judicial resources, speed the subsequent retrial in [the] case and provide guidance to the lower courts . . .") (internal citation omitted).

The "relief-centered" approach rejected in *Henry*, 197 F.3d at 1366, but applied by the Third Circuit, elevates form over substance. It fails to account for procedural limitations and would operate to foreclose federal habeas relief to unsuspecting petitioners who follow state rules

that limit grounds for appeal. In Pennsylvania, for example, a defendant appealing his conviction does not petition the supreme court as of right (except in death penalty cases). State law limits grounds for allocatur to claims that an appellate court decision contradicts United States or Pennsylvania Supreme Court law, contradicts another appellate decision, or involves an issue of immediate public importance. Pa. R.A.P. 1114. Petitioner's characterization of the issues comported with state appellate procedure and still afforded the Pennsylvania Supreme Court the opportunity to remedy the substantive claim.

Accordingly, for purposes of federal habeas review, Petitioner had exhausted his state remedies after the Pennsylvania Supreme Court's denial of allocatur affirmed the superior court's finding of waiver. After that first full round, Petitioner had "fairly presented" his claim. Further, the state courts had litigated the issue of Petitioner's waiver, and PCRA proceedings were superfluous. *See Boerckel*, 119 S. Ct. at 1732 (collateral review is unnecessary) (citing *Brown v. Allen*, 344 U.S. 443, 447 (1953)). This is not one of those cases where petitioner's claim was a stranger to state review. *See, e.g., Duncan*, 513 U.S. at 365-66. Requiring collateral review of a claim already presented to each state court would force a petitioner to file repetitive actions seeking to "cure" the default. The repetitive petitions would be reviewed by the very courts that found and affirmed the default already. No court has ever required a petitioner to go so far. *See Boerckel*, 119 S. Ct. at 1732.

II. THE THIRD CIRCUIT'S DECISION CONTRAVENES THIS COURT'S "FAIR PRESENTATION" STANDARD AND MISAPPLIES *DUNCAN v. HENRY*.

The Third Circuit's opinion contravenes this Court's precedents. First, the decision ignored a well-established

"fair presentation" framework announced in *Picard* and *Harless* and imposed an additional legal burden requiring a state prisoner to do more than present the substance of his habeas claim to the state courts for purposes of exhaustion. Second, the decision misapplied this Honorable Court's ruling in *Duncan v. Henry*.

In affirming the district court's denial of habeas relief, the Third Circuit first observed that Petitioner fairly presented the conflict issue to the Pennsylvania court of common pleas and the superior court. However, the Third Circuit concluded that Petitioner's petition for allocatur failed to present the conflict issue to the Pennsylvania Supreme Court by seeking review of the lower court's decision instead of a review of the merits. App. 3a. The Third Circuit's holding appears to require Petitioner not only to present the conflict issue to the Pennsylvania Supreme Court but also to ensure that the relief requested is a ruling on the merits by that court. As set forth in Section I.A., *supra*, this Honorable Court's formulation of "fair presentation" imposes no such requirement.

The Third Circuit misapplied *Duncan v. Henry*, 513 U.S. 364 (1995), a case in which this Court found petitioner failed to exhaust because he "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan*, 513 U.S. at 366. In short, *Duncan* is a case where the prisoner failed to raise any claim under the federal constitution until he sought relief in federal court. Unlike *Duncan*, the Petitioner here "apprise[d]" every Pensylvania court of his Sixth Amendment conflict claim by identifying the specific right violated, setting forth the facts and arguing Supreme Court precedents in support.

Even without explicitly being requested to rule on the merits of the conflict claim, the Pennsylvania Supreme Court had full opportunity and jurisdiction to consider and provide redress for Petitioner's conflict claim. It was sufficient for Petitioner to seek reversal of a finding of waiver where the request for reversal, if successful, ultimately would result in a ruling on the merits of the conflict claim itself. Moreover, the Pennsylvania Supreme Court twice already had addressed appeals in this matter, and the resulting two orders governed the remaining review process. In light of the orders, the petition for allocatur sought reversal to obtain merits review. Under 42 Pa. Cons. Stat. Ann. § 726, the Pennsylvania Supreme Court had jurisdiction and discretion to rule on the merits of the conflict claim.

The petition for allocatur, therefore, put the conflict issue squarely before the Pennsylvania Supreme Court and gave that court an opportunity to correct any violation of Petitioner's federal rights. *See Boerckel*, 119 S. Ct. at 1732 ("Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims.") (O'Connor, J.). Contrary to the Third Circuit's finding, Petitioner argued the facts that led to the conflict claim; he provided the Pennsylvania Supreme Court with the legal theory based on this Court's precedents and the Constitution of the United States to support that claim; and, finally, the Pennsylvania Supreme Court had jurisdiction and the power to rule on the merits. In sum, Petitioner exhausted his state remedies by fairly presenting the conflict issue to the Pennsylvania Supreme Court.

CONCLUSION

For the reasons stated above, this Honorable Court should grant this petition for a writ of certiorari, and either remand this case for reconsideration or set the case for briefing and argument.

Respectfully submitted,

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March 1, 2000

APPENDICES

UNREPORTED—NOT PRECEDENTIAL

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1003

THOMAS W. JONES,

Appellant

v.

FREDERICK FRANK; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-02792)
District Judge: Honorable Anita B. Brody

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 10, 1999

Before: ROTH and WEIS, *Circuit Judges*, and
SHADUR,* *District Judge*
Filed Sep. 20, 1999

MEMORANDUM OPINION OF THE COURT

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* Honorable Milton I. Shadur, Senior District Judge for the United States District Court for the Northern District of Illinois, sitting by designation.

WEIS, *Circuit Judge.*

Petitioner Thomas W. Jones was convicted of murder in state court and received a death sentence that was later reduced to life imprisonment. The sole issue in this habeas corpus proceeding under section 2254 is whether he properly pursued his state remedies with respect to his claim that trial counsel had a conflict of interest. The District Court denied relief and we will affirm.

The District Court reviewed the petitioner's convoluted route through the post-conviction proceedings in the Pennsylvania courts. In view of the thorough discussion in the District Court's opinion, we will only briefly set out the pertinent facts.

After his conviction, petitioner appealed to the Supreme Court of Pennsylvania. That court remanded to the trial court for factual findings. *Commonwealth v. Jones*, 490 A.2d 436 (Pa. 1985). In the remand proceeding in the Court of Common Pleas, Jones raised for the first time the claim that his trial counsel had a conflict of interest. The hearing judge rejected that claim on the merits but found in the petitioner's favor on another issue.

The case then returned to the State Supreme Court. At this time, petitioner raised the conflict of interest claim as well as other issues but later withdrew it in a motion requesting vacation of the death penalty. The Supreme Court ordered the Common Pleas Court to reduce the sentence to life imprisonment and directed appeals of the remaining issues to the Superior Court of Pennsylvania.

After the Common Pleas Court reduced the sentence, petitioner appealed to the Pennsylvania Superior Court, citing a number of issues including the conflict of interest claim. Relying on Pennsylvania law, the Superior Court did not rule on the merits, but concluded that the con-

flict of interest claim was procedurally defaulted. Petitioner then filed for allocatur with the state Supreme Court, citing only the default of the conflict of interest claim. The Supreme Court denied the petition without opinion.

At this point, it was clear that the state Supreme Court had not had the conflict of interest issue fairly presented to it for resolution. In the proceedings after remand, petitioner had withdrawn the issue. In the petition for allocatur, the question presented was whether the Superior Court had correctly ruled on the default. As such, the merits of the petitioner's conflct of interest argument were not at issue. Under the exhaustion rule, petitioner must "fairly present" the claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

Petitioner had one other avenue he could pursue, the state Post-Conviction Relief Act. He took that route, filing a proceeding in the Common Pleas Court. That court again ruled that the conflict of interest issue had no merit. Petitioner did not appeal that order and it thus became final.

Only after some time had elapsed did petitioner resort to the District Court. It is obvious that by not fairly presenting the issue to the state Supreme Court on direct review, or by not appealing the adverse ruling of the Court of Common Pleas on collateral review, he failed to comply with 28 U.S.C. § 2254(b). Because it is too late for petitioner to do so now, he has procedurally defaulted. This procedural bar requires him to show "cause and prejudice" or a "fundamental miscarriage of justice" for his default. *See McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). Petitioner has not satisfied this requirement. We therefore agree with the District Court that petitioner is not eligible for federal court review.

The order of the District Court will be affirmed.

/s/ Joseph F. Weis
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1003

THOMAS W. JONES,

Appellant

v.

FREDERICK FRANK; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Before: ROTH and WEIS, *Circuit Judges* and
SHADUR, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a), on September 10, 1999.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the District

Court entered November 27, 1998 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Date: Sep. 20, 1999

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-1003

TOMAS W. JONES,

Appellant.

v.

FREDERICK FRANK; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 97-cv-02792)
District Judge: Honorable Anita B. Brody

Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and WEIS, *Circuit Judges*
SHADUR [1], *District Judge*

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[1] Honorable Milton I. Shadur, Senior District Judge for the United States District Court for the Northern District of Illinois, vote limited to panel rehearing only.

ORDER

The petition for rehearing *en banc* filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

In considering the petition for rehearing, the panel has noted that the language of paragraph 6, on page 8, misstates the record. Jones's allocatur petition to the Pennsylvania Supreme Court did not, as the rehearing petition states, expressly argue the merits of the conflict of interest claim. For example, on page 9, footnote 3, of the petition for allocatur (page 203 of the Appendix), counsel states:

> Petitioner will not now argue in detail the legal analysis supporting his contention that trial counsel's performance was hindered by a debilitating conflict of interest. The argument was painstakingly briefed and then argued before the Superior Court. As discussed *infra*, petitioner seeks only that this Court order the Superior Court to decide the conflict issue.

Counsel is admonished in the future to give greater care to the preparation of pleadings to be filed with this court.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Dec. 2, 1999

APPENDIX C

[Filed Nov. 27, 1998]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 97-2792

THOMAS W. JONES

v.

FREDERICK FRANK, *et al.*

MEMORANDUM AND ORDER

Petitioner seeks habeas corpus relief from his state court conviction pursuant to 28 U.S.C. § 2254. He asserts that trial counsel had a conflict of interest that violated his Sixth Amendment right to effective assistance of counsel. The petition will be denied.[1]

I. Facts and Procedural History

In August, 1982, petitioner, Thomas W. Jones (Jones), was tried and convicted by a jury of first degree murder, robbery, and possession of an instrument of crime. After a penalty hearing, held before the late Judge Eugene Gelfand of the Court of Common Pleas, Philadelphia

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[1] On June 5, 1997, this petition was referred to a United States Magistrate Judge. The magistrate did not issue a Report and Recommendation. Therefore, I have completed a de novo review of the entire petition.

County, the jury returned a sentence of death. Jones was represented at trial by Stephen H. Serota, Esquire.

After the trial, Judge Gelfand appointed new counsel, Pamela Pryor Cohen, Esquire, to file post-verdict motions. Among the motions filed by Cohen was one for ineffective assistance of counsel, limited to allegations of Serota's ineffective representation during voir dire and during the penalty phase of the trial. (*See Commonwealth v. Jones* (June 18, 1984) (trial opinion), at 30, 31). In March, 1983, Judge Gelfand denied the motions and sentenced Jones to death. (*Id.* at 32). Cohen filed an appeal to the Pennsylvania Supreme Court citing the same grounds of ineffectiveness as those raised in the post-trial motion.

On April 23, 1985, the Pennsylvania Supreme Court remanded the case to the trial court with directions to conduct an evidentiary hearing and make findings on the ineffectiveness of counsel issue. *Commonwealth v. Jones*, 490 A.2d 436 (Pa. 1985). Jones was appointed yet another attorney, Peter Vaira, Esquire, for the remand hearings which were held before Judge Charles Durham [2] of the Court of Common Pleas, Philadelphia County.

Vaira raised to Judge Durham, for the first time, the issue of ineffectiveness based upon conflict of interest. To prepare for the remand hearings, Vaira conducted an extensive investigation. This investigation revealed a conflict of interest by trial counsel Serota. (*See* Vaira affidavit, at 2-3, *Commonwealth v. Jones*, 596 A.2d 155 (Pa. 1991), attached to Brief for Petitioner).

The conflict involved Serota's simultaneous representation of both Jones and his brother-in-law, Charles Nichols.

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[2] Judge Durham was assigned the evidentiary hearings following the death of Judge Gelfand.

(Factual details from *Commonwealth v. Jones* (July 29, 1994) (PCRA opinion) and *Commonwealth v. Jones* (Dec. 21, 1987) (remand opinion)). In August, 1981, Jones's brother committed suicide. On September 2, 1981, while at the funeral home making arrangements for Jones's brother's funeral, Jones and Nichols began to argue, which led to Nichols shooting and seriously wounding Jones.

Later that month, Nichols was arrested on a charge of attempted murder. Nichols hired Serota as his defense lawyer. On January 26, 1982, Jones was arrested for murder. Nichols suggested to Jones that Serota also represent him and offered to help pay Serota's fee. Serota undertook to represent Jones. On March 12, 1982, while Serota was representing both Nichols and Jones, the charges against Nichols were *nol prossed* because Jones refused to testify.

Jones's trial began on July 21, 1982. At the conclusion of the trial on August 4, 1982, the jury recommended a sentence of death, and a death sentence was imposed by Judge Gelfand on March 11, 1983. (*See Commonwealth v. Jones* (June 18, 1984) (trial opinion)). In September, 1982, Serota petitioned the court to withdraw as counsel and was given permission to do so on October 25, 1982.

Vaira presented three issues to Judge Durham during the evidentiary hearings: (1) trial counsel was ineffective in failing to present a diminished capacity claim during the guilt phase of the trial; (2) trial counsel was ineffective in failing to present evidence of emotional trauma during the penalty phase; and (3) trial counsel labored under a conflict of interest that rendered him ineffective. (*See Commonwealth v. Jones* (Dec. 21, 1987) (remand opinion), at 2, 6). After holding hearings on September 14, October 7, and October 26, 1987, Judge Durham found trial counsel Serota ineffective at the penalty phase.

(*See id.* at 7). In addition, he found that Serota was not ineffective during the guilt phase and found the conflict of interest claim meritless. (*See id.* at 4-6). Judge Durham took no further action and returned the case to the Pennsylvania Supreme Court on December 22, 1987.

On March 7, 1988, Vaira, still counsel for Jones, petitioned the Pennsylvania Supreme Court to vacate the death sentence and to grant a stay of execution. (*See* Petition for Order Vacating Sentencing of Death on the Basis of the Lower Court's Finding of Ineffective Assistance of Counsel Upon Remand, and Application for Stay). In its April 5, 1988 response to the petition, the Commonwealth stated that it did not contest Judge Durham's finding that trial counsel Serota was ineffective at the penalty stage. (*See* Commonwealth's Letter of April 5, 1988). On June 23, 1988, Jones applied to the Pennsylvania Supreme Court for extraordinary relief. (*See* Application for Extraordinary Relief to Remand Case to the Trial Court to Vacate Sentence of Death on the Basis of Trial Court's Finding of Ineffective Assistance of Counsel and Application to Transfer Remaining Appellate Issues to the Superior Court). This second application renewed the request to vacate the sentence of death and added a request to transfer the remaining appellate issues to Superior Court. The application also stated that there was no reason to hold a hearing on the earlier petition: "This Court issued an Order scheduling this matter for a hearing on October 24, 1988. In view of the Commonwealth's position, there is no issue in controversy before this Court and no reason to hold a hearing." *Id.* at 4 (para. 16). On November 23, 1988, the Pennsylvania Supreme Court, in response to the second application, ordered the trial court to impose a life sentence and directed further appeals to Superior Court. *Commonwealth v. Jones*, 550 A.2d 346 (Pa. 1988). On January 18,

1989, Judge Lynne Abraham imposed a life sentence and the sentence was appealed to the Pennsylvania Superior Court.

New counsel, Robert Hickok, Esquire, and Brian Ortelere, Esquire, represented Jones before the Pennsylvania Superior Court. Once again, Jones contended trial counsel Serota was ineffective because he had a conflict of interest. Attorney Cohen, the attorney who succeeded Serota, did not base the ineffective assistance of counsel claim raised in the post-trial motions upon the conflict of interest. On March 8, 1990, relying on Pennsylvania law, the Superior Court found the issue of ineffective assistance of counsel based upon a conflict of interest waived since it had not been raised "at the earliest stage in the proceedings at which counsel whose effectiveness is being challenged no longer represents appellants." *Commonwealth v. Jones*, 570 A.2d 1338, 1344 (Pa. Super. Ct. 1990).

On May 30, 1990, Jones filed a Petition for Allowance of Appeal requesting that the Supreme Court order the Superior Court to address the conflict of interest issue. Jones's allocatur brief identifies the following Question for Review:

> Whether the Supreme Court erred in deeming petitioner's conflict of interest argument waived after this Court expressly mandated that the lower courts consider the issue and the Common Pleas Court, consistent with this Court's orders, compiled a full record and ruled on the issue.

Petitioner's Allocatur Brief to Pennsylvania Supreme Court, at 3. On July 11, 1991, the Supreme Court denied the petition for allocatur without opinion.

In February, 1992, Jones challenged his conviction under the Pennsylvania Post Conviction Relief Act

(PCRA). 42 Pa.C.S. §§ 9541-46. The PCRA petition focused on the issue of ineffective asistance of counsel due to conflict of interest. David Rudenstein, Esquire, was originally appointed to represent Jones. Rudenstein withdrew after concluding the proceedings lacked merit. Jones opposed Rudenstein's withdrawal and another lawyer, Timothy Mara, Esquire, was appointed. Mara filed an amended petition that also concentrated on the issue of ineffectiveness based upon counsel's conflict of interest. (*See Commonwealth v. Jones* (July 29, 1994) (PCRA opinion), at 4, 5). On December 14, 1993, Judge Papalini of the Court of Common Pleas, Philadelphia County, held oral argument on the PCRA petition. He refused to hold an evidentiary hearing and used the record developed by Judge Durham in 1987.

The PCRA limits relief to claims that have not been previously litigated or waived. 42 Pa.C.S. §§ 9543, 9544; *see also Sistrunk v. Vaughn*, 96 F.3d 666, 669 n.1, (3d Cir. 1996) (explaining PCRA). Judge Papalini presumed that there had been no intentional waiver of the conflict issue by attorney Cohen. (*See Commonwealth v. Jones* (July 29, 1994) (PCRA opinion), at 9). In addition, he presumed that she had been ineffective in failing to discover Serota's conflict of interest. On July 29, 1994, Judge Papalini found that Serota had a conflict of interest and that Jones had not waived the conflict. (*See id.* at 10). Nonetheless, he denied relief becaue he found that the conflict did not adversely affect Serota's representation of Jones. (*See id.*). Jones did not appeal this decision to a higher Pennsylvania court.

On April 22, 1997, Jones filed a petition for a writ of habeas corpus in federal court. Jones, now represented by James Backstrom, Esquire, contends that the petition is proper because the ineffectiveness claim based upon a

conflict of interest of trial counsel Serota (conflict of interest claim) has been presented to each state court. The Commonwealth argues that petitioner has procedurally defaulted, which prevents federal habeas review of the claim. Oral argument was held before me on November 5, 1998.

II. Analysis

Initially, I will examine Jones's conflict of interest claim to determine whether there has been exhaustion of state remedies. This analysis will focus upon the concept of fair presentation. After determining that Jones has failed to exhaust state remedies, I will consider whether Jones has committed a procedural default. Finding a procedural default, I will determine whether this default can be overcome or whether I am barred from reviewing the merits of the petition.

A. Exhaustion

"A federal habeas court may not grant a petition for a writ of habeas corpus filed by a person incarcerated from a judgment of a state court unless the petitioner has first exhausted the remedies available in the state courts." *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1998). To meet the exhaustion requirement, the petitioner must give each level of the state courts an opportunity to pass upon and correct the asserted constitutional violation. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3d Cir. 1992). To decide whether the state courts have had a chance to remedy the asserted error, a federal habeas court examines the federal claim to determine if it has been "fairly presented," *Picard v. Connor*, 404 U.S. 270, 275 (1971).

Fair presentation consists of both legal theory and supporting facts. The test is whether the "claims raised in

the state courts are substantially equivalent to those asserted in federal court." *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Therefore, it is insufficient for the petitioner to do no more than place "all the facts necessary to support the federal claim . . . before the state court." *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *see also Landano v. Rafferty*, 897 F.2d 661, 669 (3d Cir. 1990) (citing fair presentation cases). The petitioner must also make the same method of legal analysis available to both the state and federal courts. *Evans*, 959 F.2d at 1231.

It is unnecessary for each state to discuss an issue in order for petitioner to demonstrate fair presentation. Rather, the issue must be presented to each court in a manner which gives it an opportunity to rule on the claim. *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984).

Jones asserts the exhaustion requirement on the conflict of interest claim has been met through the following series of court proceedings. First, following Jones' jury conviction in the Court of Common Pleas before Judge Gelfand, the conflict of interest was presented to the Pennsylvania Supreme Court on direct appeal. Second, after Judge Durham of the Court of Common Pleas completed the remand proceedings, the issue was presented to the Pennsylvania Supreme Court. Third, following the Pennsylvania Supreme Court's grant of extraordinary relief, the Superior Court considered the claim. Fourth, after the Superior Court found a waiver, the allocatur petition presented the issue to the Pennylvania Supreme Court. Fifth, Judge Papalini of the Court of Common Pleas examined the claim in a PCRA proceeding. Jones, however, has never given the Pennsylvania Supreme Court the opportunity to decide the claim as it has been presented to this Court. Therefore, Jones has not fairly

presented tne conflict of interest and has not exhausted state remedies.

The initial appeal to the Pennsylvania Supreme Court followed Jones's jury conviction in the Court of Common Pleas before Judge Gelfand. The ineffective assistance claim was based solely on Serota's performance during voir dire and during the penalty phase of the trial. The conflict of interest issue had not been raised at all.

The matter returned to the Pennsylvania Supreme Court after Judge Durham, on remand, completed his fact finding on the conflict of interest. Jones then filed two applications to the Pennsylvania Supreme Court. The first application sought to vacate the death sentence and to stay execution. Jones asserts that this application fairly presented the issue because it enabled the Pennsylavnia Supreme Court to resolve the conflict of interest claim as a matter of law. Before the Pennsylvania Supreme Court ruled on the application, however, Jones presented a second application requesting extraordinary relief.[3] The second application sought to vacate the sentence of death, to transfer the remaining issues to Superior Court, and to revoke the first application. This application did not present the conflict issue to the court. The Pennsylvania Supreme Court granted the relief requested in the second application and never considered the issues raised in the first application. Therefore, the fair presentation standard cannot be established at this stage of the case.

Following the Superior Court's finding of waiver, Jones appealed to the Pennsylvania Supreme Court, filing his allocatur brief based solely on the issue of waiver, not the Sixth Amendment claim. Therefore, Jones presented a different issue to the Pennsylvania Supreme Court than

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[3] Jones filed his second application less than four months after the first application.

the claim before this Court. When the Supreme Court denies allocatur without opinion, it is presumed that the basis for that decision is the same as that of the last reasoned opinion. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). In this case, the last reasoned opinion was that of the Superior Court which ruled solely on the grounds of waiver. Therefore, both because the request for allocatur was restricted to a review of the Superior Court's ruling of waiver and because the denial of allocatur followed a Superior Court decision based on waiver, the conflict issue had not been fairly presented to the Supreme Court. Jones fails to meet the fair presentation standard established by *Doctor* and *Evans*.

The last Pennsylvania court to examine the conflict of interest was the PCRA court. Judge Papalini denied relief on the merits, but Jones did not appeal the decision to a higher Pennsylvania court. At this point, Jones had not fairly presented his claim to the Pennsylvania Supreme Court. Therefore, Jones needed to appeal Judge Papalini's decision to allow the Pennsylvania Supreme Court to decide the issue.

To overcome the failure to exhaust, Jones presents a novel argument based upon *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), albeit one that is takent out of context. Jones focuses on a single sentence from *Ylst*: "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst*, 501 U.S. at 801. Jones's reading of *Ylst* disregards the well settled jurisprudence of the limitations that comity imposes upon federal habeas review. According to Jones, this language from *Ylst* obviates the need to pursue state collateral proceedings through the higher state court. Instead, state collateral relief need be followed only until a court considers the merits. Once the merits of the fed-

eral claim are reached, he argues, a petitioner can move to federal court. This theory contradicts precedent. Presentation of a claim to the Pennsylvania Supreme Court is a prerequisite to federal habeas review. *See Castille v. Peoples*, 489 U.S. 346, 349-51 (1989) (requiring presentation of claim to Pennsylvania Supreme Court to satisfy exhaustion); *Burkett v. Love*, 89 F.3d 135, 138 (3d Cir. 1996) ("To satisfy the exhaustion requirement, the claim must be presented to the state's higher court."). This requirement is not eliminated in a PCRA proceeding. *Cf. Swanger*, 750 F.2d at 295 (eliminating need to pursue collateral remedies only for claims exhausted on direct review). Petitioner's reading disregards the Supreme Court's statement in *Coleman* that "procedural default for purposes of federal habeas [occurs] regardless of the decision of the last state court to which the petitioner actually presented his claim." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

In addition, Jones's reading of *Ylst* increases federal judicial power by eviscerating the PCRA. The PCRA is the sole path to collateral relief in Pennsylvania. PCRA courts, however, can only hear claims that have not been previously litigated or waived. Few, if any, claims that are procedurally defaulted under federal habeas law do not fit within these two categories. To enable a petitioner to bring a federal habeas petition without Pennsylvania Supreme Court review of a federal claim raised in a PCRA proceeding, as Jones urges, converts the PCRA into a mere exhaustion device. This theory creates "an end run around the limits of [federal] jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731. Jones's argument from *Ylst* is untenable.

B. Procedural Default

Jones's failure to appeal the adverse PCRA decision means the issue of Serota's conflict of interest has not been exhausted. In this case, a procedural default results from the lack of exhaustion. Due to the procedural default, this court is barred from reviewing Jones's claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A procedural default exists when a two-prong test has been met: (1) a petitioner has failed to exhaust state remedies and (2) the court to which the claim would have to be presented in order to meet the exhaustion requirement would find it procedurally barred. *Coleman*, 501 U.S. at 735 n.1. Jones' failure to exhaust state remedies by not fairly presenting the claim to the Pennsylvania Supreme Court satisfies the first prong of procedural default.

The second prong, the existence of a procedural bar, has been met because it is now too late for Jones to appeal the adverse PCRA ruling by Judge Papalini. At oral argument, counsel for Jones stated that no further state remedies exist. (*See* Transcript of November 5, 1998 Hearing, at 44-47). This concession by counsel for Jones is supported by the fact that the statute of limitations in the PCRA precludes further review;[4] Pennsylvania has a firm[5] 30-day limit for appeals;[6] and, under similar circumstances, petitioners for habeas corpus have been denied relief. *See, e.g., Glass v. Vaughn*, 65 F.3d 13, 15 (3d Cir. 1995) (failing to appeal PCRA decision creates a procedural default); *Caswell v. Ryan*, 953 F.2d

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[4] 42 Pa.C.S. § 9545(b)(1).

[5] Pa.R.A.P. 105. *See Commonwealth v. Meehan*, 628 A.2d 1151, 1155 (Pa. Super. Ct. 1993).

[6] Pa.R.A.P. 903.

853, 860-61 (3d Cir. 1992) (procedurally defaulting claim not included in allocatur petition); *Beaty v. Patton*, 700 F.2d 110, 112-13 (3d Cir. 1983) (failing to file allocatur petition creates procedural default).

A federal habeas court cannot review a procedurally defaulted claim unless the petitioner demonstrates either (1) cause and prejudice or (2) a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. As to cause and prejudice, they are never asserted by Jones. Jones alludes to a miscarriage of justice, but fails to pursue this avenue.

Cause refers to "some objective factor external to the defense" that creates the procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Jones never asserted that there was cause for his procedural default, and, thus, he did not meet his burden.[7]

The fundamental miscarriage of justice exception to procedural default requires a petitioner to show "actual innocence." *Schlup v. Delo*, 115 S.Ct. 851, 867 (1995). Jones has never argued actual innocence. This exception

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[7] Three possible arguments may exist, however, but none establishes cause. No allegation of cause can overcome the procedural default created by the failure to appeal the PCRA decision. *See Coleman*, 501 U.S. at 752-57 (no cause for failure to appeal without right to counsel); *Caswell*, 953 F.2d at 862 ("absence of counsel" not enough for cause); *Tillett v. Freeman*, 868 F.2d 106, 108 (3d Cir. 1989) (noting ineffective assistance of PCRA counsel solely concerns state law). At oral argument, Jones's counsel stated that attorney Cohen had not been ineffective and implied attorney Vaira had not been ineffective in not alleging Cohen to be ineffective. (*See* Transcript, at 62-63). These concessions eliminate any possible finding of cause on the direct appeals. A colloquy during oral argument hinted that the Superior Court's waiver finding may create cause. (*See id.*, at 63). However, it is unnecessary to decide whether that finding satisfies the cause prong. Because the PCRA court examined the conflict of interest on the merits, there is no prejudice to the Superior Court's waiver finding.

requires a petitioner to make a threshold showing that no reasonable juror would have voted to convict. *Glass*, 65 F.3d at 16-17. Instead, Jones asserts that combining the conflict of interest with alleged state judicial errors creates a miscarriage of justice. (*See* Reply to Commonwealth's Response to Petition for Writ of Habeas Corpus). Based upon Jones's submissions, this requirement cannot be met.[8] Therefore, the miscarriage exception is inapposite to the facts of this case.

THEREFORE, this 24th day of November, 1998, after considering the pleadings and record, it is ORDERED that for the foregoing reasons the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED.

/s/ Anita B. Brody
ANITA B. BRODY, J.

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[8] Jones argues that Serota could have pursued a plea agreement or a defense of diminished capacity, which may have resulted in a lesser sentence for Jones. (*See* Memorandum of Law, at 2, attached to Petition for Writ of Habeas Corpus).

APPENDIX D

[Filed Mar. 8, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF PENNSYLVANIA

Civil Action No. 97-2792

THOMAS W. JONES

v.

FREDERICK FRANK, *et al.*

ORDER

AND NOW, this 5th day of March, 1999, I ISSUE a Certificate of Appealability because the applicant Thomas Jones has made a substantial showing of the denial of a constitutional right as discussed in my Memorandum and Order of November 24, 1998.

/s/ Anita B. Brody
ANITA B. BRODY, J.